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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 13 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification,[1] is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. The reference letters are not as persuasive as counsel asserts on appeal. Moreover, it appears that the petitioner is researching technology developed and patented by his supervisor. Nevertheless, the petitioner has submitted evidence that his first-authored article has generated some media attention and has served as part of the basis for the clinical trials performed and the private funding received by his employer. Moreover, on appeal, the petitioner submits evidence that he has been consistently cited, including his articles published in China. Given this evidence *in the aggregate*, we are adequately persuaded that the waiver of the job offer requirement is warranted in this matter.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

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[1] On March 28, 2007, the petitioner's employer filed a petition in his behalf supported by an alien employment certification certified by the Department of Labor. Thus, the petitioner seeks to waive a requirement he is now able to meet.

The petitioner holds a Medical degree obtained in 1985 and a Master's degree in Medical Microbiology and Immunology obtained in 1990, both from Qingdao Medical College. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, immunology, and that the proposed benefits of his work, yeast-based vaccines for cancer and other diseases, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In October 1999, the petitioner joined the laboratory of [redacted] at the University of Colorado Health Sciences Center. At that time, [redacted] and other colleagues from the University of Colorado had already formed the company GlobeImmune for the purpose of developing and marketing their patented technology that delivers yeast based drugs to stimulate the patent's immune system. [redacted] then recruited the petitioner to work at GlobeImmune. GlobeImmune received over $34 million in private venture capital in 2005 on top of the $8 million it received previously.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner relies on eight reference letters, his publication record and media coverage of GlobeImmune. At the outset, however, we note that the record does not support counsel's implication on appeal that four of the previously submitted seven reference letters are from independent experts in the field. Rather, all of the previous references have a direct connection to either the University of Colorado Health Sciences Center or [redacted]

While letters from independent references who have been influenced by the petitioner's work and frequent citation are often useful evidence to demonstrate an alien's influence in the field, we acknowledge that the petitioner works for a private company conducting preliminary clinical trials on technology that is protected by patents, limiting its use beyond GlobeImmune. While we will take into account the intellectual property law considerations involved in this matter, the petitioner must still demonstrate his influence in the field.

[redacted] asserts that the three founders of GlobeImmune patented technology to treat cancer and certain infectious diseases. This technology consists of yeast-based drugs containing antigens that stimulate the patient's own immune system. The petitioner is not one of the founders and the record contains no evidence that he is listed on a patent or patent application. Nevertheless, [redacted] explains that the petitioner "is playing the leading role in the research and development of

two of our three leading products." Specifically, the GI-4000 series of products target Ras protein mutations found in many colorectal cancers, a significant number of lung cancers and nearly all pancreatic cancers. [redacted] asserts that the petitioner's breakthrough in this area was reported in his first-authored 2004 article in *Cancer Research*. [redacted] notes that this journal is the top cancer journal and the 13th ranked science journal. While this fact will be taken into consideration, we will not presume the influence of an individual article from the prestige of the journal in which it appeared. That said, the petitioner's article was featured as a "highlight" in that issue. Moreover, *NewsRx* reported the petitioner's results on its website, quoting the petitioner in its Internet article. On appeal, the petitioner submits evidence that this article has been cited.

More significantly [redacted] asserts that the GI-4000 series of products are now in phase one clinical trials. Several articles in biotechnology publications support this assertion. As noted above, these articles also report that GlobeImmune secured an additional 34 million in venture capital in 2005. The funding comes from the venture capital divisions of major pharmaceutical companies. According to *BioCentury*, the capital will fund Phase II testing for the company's "lead cancer program." This article and others indicate that the GI-4000 products for cancer, the subject of the petitioner's 2004 article, are all part of GlobeImmune's most progressed project, even though the company is also pursuing an HIV and Hepatitis C vaccines. This evidence supports a conclusion that the petitioner has played a major role in the research that directly resulted in $34 million in venture capital to pursue Phase II clinical tests on a promising cancer treatment.

Finally, on appeal, the petitioner submitted evidence that he has a record of publishing articles that generate at least some attention in the field. Specifically, the petitioner submitted evidence that his work has been consistently cited, including his articles in China which also relate to cancer immunology.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the immunology community recognizes the significance of this petitioner's research rather than simply the general *area* of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the alien employment certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.